FOREIGN INVESTMENT REVIEW

Spain

LEXOLOGY
Getting The Deal Through

Consulting editor
McCarthy Tétrault LLP

Foreign Investment Review

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into law, policy and relevant authorities; procedure, including thresholds and timelines; substantive assessment, including interagency and international consultation, remedies and rights of challenge and appeal; relevant recent case law; and other recent trends.

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LAW AND POLICY

Policies and practices

What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Last year, the Spanish government adopted restrictive policies on foreign investment in Spain because, owing to the current economic situation and the lower valuation of certain Spanish legal entities, foreign buyers could take control of Spanish entities at a lower cost. Throughout 2020, owing to the covid-19 crisis, the applicable law was modified so that foreign investments are subject to increasing scrutiny. The new policies specifically focus on investments that exceed a certain threshold of the share capital of Spanish entities that operate in critical sectors or are made by certain purchasers.

Law stated - 10 November 2021

Main laws

What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

The main laws governing foreign direct investment in Spain are the following:

- Law 19/2003 of 4 July 2003, on legal arrangements for capital movements and economic transactions abroad;
- Royal Decree-Law 664/1999 of 23 April 1999, on foreign investment; and
- Ministerial Order of 28 May 2001, which regulates the procedure for requesting authorisation and the procedure for declaring the investment.

In addition, four royal decree-laws have been enacted since March 2020:

- Royal Decree-Law 8/2020 of 17 March 2020, on extraordinary urgent measures to address the economic and social impact of covid-19;
- Royal Decree-Law 11/2020 of 31 March 2020, for the adoption of additional urgent measures in the social and economic field to deal with covid-19;
- Royal Decree-Law 34/2020 of 17 November 2020, on urgent measures to support business solvency and the energy sector, and in the field of taxation; and

Royal Decree-Law 12/2021 of 24 June 2021, adopting urgent measures in the field of energy taxation and energy generation, and on the management of the regulation levy and the water use tariff.

Law stated - 10 November 2021

Scope of application

Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The scope of application of Law 19/2003 of 4 July 2003 and Royal Decree 664/1999 is, in general, any act, business, operation or transaction that, by its nature, form or conditions of performance, affects or may affect activities related, even occasionally, to the exercise of public authority, activities directly related to national defence, or activities that affect or may affect public order, public security and public health.

Specifically, the laws and the royal decree-laws focus on the screening mechanism for foreign direct investments in Spain, which are those investments in which a non-resident in the European Union or in the European Free Trade Association (EFTA) acquires 10 per cent or more of share capital in a Spanish company, whether listed or unlisted, or acquires control over it. According to article 7.2 of Law 15/2007 on antitrust, to acquire control over the company means to become a party to contracts or acquire rights that allow the investor to have a decisive influence in the target company. Consequently, even the acquisition of minority interests is subject to screening.

Although the laws do not mention indirect investments, they are also subject to scrutiny, as any investment in a company from another country that has subsidiaries in Spain may also be reviewed by the authorities.

The laws also provide penalties for failure to comply with the obligation to request the authorisation to invest.

Ministerial Order of 28 May 2001 applies generally to foreign investment, but it specifically concerns practical aspects of the screening mechanism for foreign direct investments regulated in the aforementioned laws, such as the procedure to request an authorisation to invest and the procedure to declare the investment, apart from focusing on the screening mechanism itself.

Royal Decree-Law 8/2020 of 17 March 2020, passed at the outbreak of the covid-19 pandemic, included provisions concerning foreign direct investment in Law 19/2003 of 4 July 2003, including a new article 7 bis, which established the foreign direct investment screening mechanism.

On the other hand, the scope of application of Royal Decree-Law 11/2020 focuses on certain foreign direct investment operations that enjoy a fast-track scrutiny mechanism.

Finally, Royal Decree-Law 34/2020, in addition to modifying Law 19/2003, temporarily includes within its scope investments both in Spanish listed and unlisted companies (provided that the unlisted company exceeds €500 million in turnover), carried out by residents in the European Union and EFTA.

Law stated - 10 November 2021

Definitions

How is a foreign investor or foreign investment defined in the applicable law?

Law 19/2003 defines foreign direct investment, in article 7 bis, as all investment as a result of which the investor holds a stake equal to or greater than 10 per cent of the share capital of a Spanish company, or when as a result of a corporate operation, act or legal transaction, the investor effectively acquires control of a company, provided that one of the following occurs:

- the investment is carried out by residents of countries outside the European Union or EFTA; or
- the investment is carried out by residents of countries of the European Union or EFTA but whose real ownership corresponds to residents of countries outside the European Union and EFTA; real ownership shall be understood to exist when the latter possesses or ultimately controls, directly or indirectly, more than 25 per cent of the capital or of the voting rights of the investor, or when they exercise control, directly or indirectly, over the investor by other means.

On a temporary basis (from 19 November 2020 to 31 December 2021), according to the transitional provision

contained in Royal Decree-Law 34/2020 of 17 November 2020 (as amended by Royal Decree-Law 12/2021 of 24 June 2021), investments made by EU and EFTA residents, and investments made by residents of Spain whose real ownership belongs to non-EU or non-EFTA residents, are considered to be foreign direct investments.

Law stated - 10 November 2021

Special rules for SOEs and SWFs

Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

None of the laws applying to foreign direct investment provide for a definition of SOEs or SWFs.

However, there is a special rule regarding SOEs and SWFs. Article 7 bis of Law 19/2003 of 4 July specifically provides that foreign direct investments made by a company directly or indirectly controlled by a government are always subject to the screening mechanism.

Law stated - 10 November 2021

Relevant authorities

Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

According to article 11.2 of the Ministerial Order of 28 May 2001, the scrutiny of the investment must be carried out by the General Directorate for International Trade and Investment, which is a department of the Ministry of Commerce, Industry and Tourism. The scrutiny must be jointly carried out by the Directorate and the Foreign Investment Board, which will issue a report on the characteristics of the investment operation. However, the Spanish Council of Ministers will decide on the approval or denial of the foreign direct investment transaction, taking into account the information provided by the Directorate and the Foreign Investment Board.

Law stated - 10 November 2021

Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

Although the reviewing authorities must apply the criteria provided by the applicable laws on foreign investment, they have a great deal of discretion to approve or reject transactions, as the definitions given by the law about what is critical infrastructure or what a strategic sector is are too broad. At present, there is no further regulatory development to explain in depth the criteria that must be applied to grant an authorisation to foreign investors.

Law stated - 10 November 2021

PROCEDURE

Jurisdictional thresholds

What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

There are primarily two jurisdictional thresholds that determine whether a foreign direct investment is subject to scrutiny by the authorities.

The first one, as provided in article 7 bis of Law 19/2003, is the percentage of share capital and the effective control acquired by the investor in a Spanish company. The acquisition of an amount of the share capital of a company equal to or greater than 10 per cent, or the acquisition of control over the decisions of the company, trigger the review of the investment provided that:

- the investment is made in a company that conducts its activity in a strategic sector or in relation to critical infrastructure as expressly provided by law;
- the investment is made by an entity directly or indirectly controlled by a government;
- the investment is made in a company whose activity is related to national defence; or
- the investment is made by an entity that is likely to be carrying out illegal or criminal activities that affect public security, public order or public health in Spain.

If the acquisition does not lead the investor to acquire control over the company, if the investment does not reach the threshold of 10 per cent of the share capital, or if, having reached that amount, the investment does not fall within any of the above requirements, a filing will not be needed.

The second is the amount of the investment. Pursuant to the Second Transitional Provision of Royal Decree-Law 11/2020, investments under €1 million are not subject to the screening mechanism. Therefore, only investments over €1 million may need filing.

Law stated - 10 November 2021

National interest clearance

What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

The filing procedure for obtaining national interest clearance of investments is provided by article 11 of the Ministerial Order of 28 May 2001 .

The procedure starts with a request for authorisation to invest.

The request for authorisation must be made in writing to the General Directorate for International Trade and Investment. There is not a standard form for the request, which must be accompanied by the following documents:

- a certification issued by the competent body of the company in which the investment is being made, containing an exact transcription of its corporate purpose;
- a brief explanatory report on the economic, financial and asset situation of the company in which the investment is being made; and
- a detailed description of the investment operation to be carried out and information concerning the investor: in the case of investors that are considered to be legal entities, the holdings in their capital representing more than 5 per cent must be indicated, as well as the annual accounts and management report, the composition of their management bodies and the detailed structure of the group to which they may belong; in the case of individuals, information on their career and professional activity, as well as their asset situation.

Scrutiny of the transaction will be carried out jointly by the General Directorate for International Trade and Investment and the Foreign Investment Board. The Foreign Investment Board will issue a report on the transaction and, on that basis, the Council of Ministers will grant or deny the authorisation to invest.

In any case, during the review process, the General Directorate for International Trade and Investment may require from the investors or the company that is the target of the investment as many reports and as much data or background information as is deemed appropriate.

The proceeding does not have any filing fees in Spain.

Law stated - 10 November 2021

Which party is responsible for securing approval?

The responsible party for securing the approval of the investment is the investor.

Law stated - 10 November 2021

Review process

How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Article 11.3 of the Ministerial Order of 28 May 2001 provides that the authorisation must be granted or denied by the Council of Ministers within six months from the application date. If the six-month period expires and no decision has been taken, the authorisation to invest will be deemed to be denied.

There is no factor that exactly determines when the decision of the Council of Ministers is to be released, except the volume of applications and the relevance of the investments under review at the time. However, experience shows that this process typically takes six to eight weeks from the time a complete submission has been made.

The Second Transitional Provision of Royal Decree-Law 11/2020 of 31 March 2020 provides a fast-track option for investments agreed but not closed before 17 March 2020, and for investments between €1 million and €5 million. This fast-track procedure means that the reviewing authorities must grant or deny the authorisation within 30 days from the date of filing. If no decision is adopted in respect to the investment within that period, the authorisation will be deemed to be denied and the transaction may not be carried out.

Law stated - 10 November 2021

Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Yes, the review of the investment must be completed before the investor closes the transaction, and the decision of the Council of Ministers on the authorisation must also be obtained, as article 8.2 of Law 19/2003 of 4 July 2003 considers that carrying out the investment without obtaining authorisation where required is a very serious infringement. According to article 9.2.a, such infringement is sanctioned with a fine (ranging from €30,000 to the amount of the investment) and, as result, the investment will become null and void.

Law stated - 10 November 2021

Involvement of authorities

Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

None of the laws applying to foreign direct investment provides for an informal channel through which investors can be advised by the reviewing authorities, but in practice, there are informal channels to raise issues with them, such as an email address. Any questions regarding clarification of the filing procedure may be sent by email to the General Directorate for International Trade and Investment. In addition, the Directorate has made a questionnaire available to investors that may be filled out and sent back to them to determine whether the investment is subject to screening, in order to avoid filing where not necessary.

Law stated - 10 November 2021

When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

In principle, no use may be made of government relations, public affairs, lobbying or any other specialists to promote support for the transaction by the authorities. On the other hand, there are no informal procedures to facilitate the clearance as such. However, the authorities have made a questionnaire available to investors, which they may fill out and send to the authorities to confirm if there is the need to proceed to filing and to avoid it where unnecessary.

Law stated - 10 November 2021

What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

The authorities have post-closing powers to review and investigate whether an investment operation that required filing was made without the required authorisation by the Council of Ministers. In that respect, according to articles 12 and subsequent of Law 19/2003 of 4 July 2003, the General Directorate for International Trade and Investment is able to initiate investigations to clarify whether investors have committed any infringement. The Head of the Ministry of Commerce, Industry and Tourism is the authority in charge of imposing fines on the investor in the case of infringement.

Law stated - 10 November 2021

SUBSTANTIVE ASSESSMENT

Substantive test

What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The substantive test for clearance consists of proving that the investment in a Spanish company as result of which the investor acquires 10 per cent or more of share capital, or acquires effective control, does not affect national security or the national public interest.

For that purpose, the reviewing authority will examine if the investment to be made effectively falls under the scope of the screening mechanism provided by law, and, if so, if it affects public order, security or health.

The onus for showing the transaction does or does not satisfy the test is jointly on the General Directorate for International Trade and Investment and on the Foreign Investment Board. Once they have checked that the investment does or does not meet the above conditions, the Council of Ministers will grant or deny the authorisation to invest.

Law stated - 10 November 2021

To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The applicable laws on Foreign Direct Investment do not expressly provide for communication between Spanish public officials and public officials from foreign countries. However, it is known that the competent reviewing authorities of Spain are in contact with the authorities of other member states of the European Union when the investment also has pending filing proceedings in other countries.

Law stated - 10 November 2021

Other relevant parties

What other parties may become involved in the review process? What rights and standing do complainants have?

The applicable laws on foreign direct investment contain no reference to any other party involved in the filing procedure, nor do they refer to any rights that third parties are entitled to regarding the effects that the investment may have.

Law stated - 10 November 2021

Prohibition and objections to transaction

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

According to the law, there are certain investment operations that need authorisation by the Council of Ministers to be carried out. The reviewing authority has the power to prohibit the investment, as it is in its power to authorise the transaction or not, based on the criteria provided by law to grant or deny it. Without the authorisation, the operation may not be carried out, so in fact, the reviewing authority has the power to block the transaction.

Law stated - 10 November 2021

Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

No, it is not possible. Objections by the reviewing authority to the transaction cannot be avoided in any way in advance, with any kind of commitment or agreement. The authorities are independent and take their decisions according to the nature of the investment, following the criteria provided by the applicable laws on foreign investment. The decision of the authority cannot be influenced in any way, and the investor cannot make any commitments to avoid the authority's objection.

Law stated - 10 November 2021

Challenge and appeal

Can a negative decision be challenged or appealed?

Yes, a negative resolution from the Council of Ministers denying the authorisation to invest in Spain may be appealed before the Supreme Court according to article 58 of Organic Law 6/1985 of 1 July 1985, on the Judiciary.

Law stated - 10 November 2021

Confidential information

What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

None. The applicable laws on foreign direct investment do not provide for any specific safeguard to protect confidential information from being disseminated in relation to the foreign investment screening mechanism.

The consequences of a breach of confidentiality are not provided by the applicable laws either.

Law stated - 10 November 2021

RECENT CASES

Relevant recent case law

Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

There have been several investment operations that have been reviewed by the authorities. No request for prior approval for a foreign investment since the issuance of Royal Decree 8/2020 of 17 March 2020 has been denied by the Council of Ministers to date, so examples cannot be given in this respect. On the contrary, the latest investments approved by the Council of Ministers are listed below:

- Circet Odyssée S.A.S., a French company, was authorised to invest in the Spanish company Circet Iberia S.L.U. belonging to one of the strategic sectors listed by Law 19/2003 of 4 July 2003, on 28 September 2021.
- Mozart Buyer LP, a Delaware company, was authorised to invest in the Spanish company Medline International Iberia, S.L., belonging to one of the strategic sectors listed by Law 19/2003 of 4 July 2003, on 19 October 2021.
- Goldman Sachs, through its UK subsidiary Dione Bidco Limited, was authorised to indirectly invest in the Spanish subsidiaries of Lloyd's Register Inspection Limited, on 19 October 2021.

Law stated - 10 November 2021

UPDATE AND TRENDS

Key developments of the past year

Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

There are recent developments in Spain regarding foreign direct investment. Two royal decrees were issued at the

outbreak of the covid-19 pandemic (Royal Decree-Law 8/2020 of 17 March 2020 and Royal Decree-Law 11/2020 of 31 March 2020), which established a screening mechanism on certain types of investments. Additionally, in November 2020, Royal Decree-Law 34/2020 was issued. This Royal Decree-Law, as amended by Royal Decree 12/2021 of 24 June 2021, broadened the scope of application of the scrutiny mechanism provided by the previous decrees, so the scrutiny of certain investments made in Spanish companies became a hot topic during the pandemic. The information available is that a new bill to develop the current regulation is in the works at the Spanish parliament. The enactment of a new act will affect the foreign investment regime, as many of the interventionist measures adopted during the pandemic may become permanent.

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Jurisdictions

Australia	Gilbert + Tobin
Austria	Barnert Egermann Illigasch Rechtsanwälte
Cambodia	Tilleke & Gibbins
Canada	McCarthy Tétrault LLP
China	Global Law Office
Denmark	Bech-Bruun
European Union	Allen & Overy LLP
France	White & Case LLP
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India	AZB & Partners
Indonesia	Nagashima Ohno & Tsunematsu
Italy	Gianni & Origoni
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